SUPREME COURT, U. S.
No. 197
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In the Supreme Court of the United States

OCTOBER TERM, 1969

ROBERT FOYE O'NEAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1969. A petition for rehearing was denied on May 6, 1969. The petition for a writ of certiorari was filed on June 4, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was unlawfully arrested and unreasonably detained prior to his appearance before a United States commissioner.

2. Whether petitioner was entitled before trial to a list of all of the government's witnesses.

3. Whether the trial court erred in failing to give petitioner's requested instruction on impeachment.

4. Whether instructions proposed by petitioner on circumstantial evidence and mere presence at the site of a still, and a claim of misuse of the term "confession" in the closing charge, were properly rejected.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Georgia, petitioner was convicted of possessing an unregistered distillery, carrying on the business of a distiller without giving bond and with intent to defraud the United States, in violation of 26 U.S.C. 5601(a) and 5602 (Counts 1-3), and working in a distillery upon which no sign had been posted as required by 26 U.S.C. 5180 (Count 4). On April 4, 1968, he was sentenced to imprisonment for concurrent terms of thirty months on Counts 1-3 and twelve months on Count 4. The court of appeals affirmed.

1. The evidence adduced at a hearing on a motion to suppress and at trial showed that Georgia Alcohol Agents Bailey and Hendley arranged to meet with federal Alcohol and Tobacco Tax Agent Barrett in a heavily wooded area of Wilcox County, Georgia, at

10 a.m. on March 14, 1967, to investigate information that a still was somewhere in that vicinity. The State agents arrived before Barrett, and commenced to drive along some of the back roads. They observed tire tracks on one road, and followed them to a location where a 1960 Chevrolet was parked in a thicket (R. 59, 72).[1] The agents left their car and began to search the area. About 75 yards from the Chevrolet they came upon a vacant house and barn (R. 59). While searching these structures, agent Hendley observed a man, later identified as co-defendant Duncan Padgett (R. 61), walking nearby. When the agent called upon him to stop, Padgett responded by fleeing and crying out "Revenue Officers" as he ran (R. 59, 72). The agents gave chase. Padgett led them to a clearing containing four illicit 1500-gallon stills, one of which was in operation (R. 59, 72). As one of the agents reached the clearing, he saw two or three unidentified men running away. The agents lost sight of the men.

Agent Hendley radioed a nearby prison farm for help. Within a few minutes a prison warden, armed trusties, and bloodhound dogs arrived and began to track the men. The agents drove along the dirt roads in the wooded area in order to prevent the men from reaching the main roads. At about noon, the trusties and the dogs came upon Padgett, petitioner and co-defendant Eddie Cooper approximately two miles from the still site. They surrendered only after a chase during which several warning shots were fired

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[1] "R." refers to Volume I of the two-volume record filed with the Clerk of this Court.

(R. 73). During the course of the pursuit, federal agent Barrett had arrived in the area, and was in radio contact with the prison personnel and the State agents, who remained near the stills (R. 74).

2. Following their apprehension the three suspects were taken to the federal agent and then returned to the site of the stills. Both Hendley and Barrett advised them of their right to silence and counsel. They indicated that they understood their rights (R. 79-80). Thereupon, handcuffs which had been previously placed upon them were removed, and they were allowed to move about while the agents investigated the distilleries. Among the items at the site of the distilleries were a plaid shirt hanging in a tree and two jackets lying upon some metal gas cylinders. While the investigation was continuing, Padgett asked one of the officers whether he could get his shirt, pointing to the plaid shirt in the tree. He received permission to do so. After putting it on, Padgett asked Cooper and petitioner whether they wanted their jackets. Petitioner said he did, and told Padgett to get his pack of cigarettes out of a pocket. Padgett found no cigarettes in the pocket of petitioner's jacket and so advised petitioner, who then directed him to put the jacket down. Padgett did as petitioner requested (R. 63-66).

3. Agent Barrett thereafter asked whether any of the suspects owned the Chevrolet parked in the thicket. No one answered. A search of the car produced pipe fittings, a pair of pliers, and fragments of wheat bran and wheat starch, all items useful in a still operation (R. 83, 90-95). Later, petitioner

told Barrett that the car was his, and that he had owned it for about a year (R. 82). The investigation, inventory, and destruction of the stills took several hours. Then, agent Barrett drove petitioner and his co-defendants first to Fitzgerald, Georgia, to arrange for the storage of Barrett's car; thereafter they drove, in the seized vehicle, approximately 70 miles to Americus, Georgia, the closest place where a United States Commissioner resided (R. 25-28). They arrived in Americus after dark, and proceeded directly to the city jail. The suspects were lodged there for the evening and appeared before the Commissioner on the following morning (R. 30).

4. Petitioner took the stand in his own behalf. He denied telling Barrett that he had owned the car for a year, declaring that he had bought it the day before (R. 114, 115). Petitioner stated that, on the morning of March 14, he had allowed his neighbors, Cooper and Padgett, to use the car on condition that they drive him to a pond where he intended to fish. After several hours Padgett and Cooper [2] emerged from the woods, near where petitioner was fishing, and declared that they had gone to a still but that agents had run them off, leaving petitioner's car behind. Petitioner told them that there was no use standing around and they might as well leave the area. As they walked across a road, they heard shots and saw armed prison trusties coming after them. Padgett and Cooper began to run, and petitioner, frightened, joined them. They later surrendered after more shots

[2] Both Padgett and Cooper had been tried prior to petitioner (Pet. 7).

were fired (R. 108-110). Petitioner declared that his jacket had been left behind in the car when he was dropped off, and that he had no knowledge of the use of the car for violations of the liquor laws (R. 112). Petitioner's explanation had never been disclosed to any of the agents prior to trial (R. 115, 118).

ARGUMENT

1. At the pre-trial hearing on his motion to suppress, petitioner challenged the validity of his arrest and the promptness of the preliminary hearing. Both allegations were, in our view, properly rejected by the lower courts.

a. The validity of petitioner's initial apprehension by prison trusties enlisted to assist the State agents cannot be measured by the application of standards regarding citizen arrests of persons unknown to them for offenses not committed in their presence. Prior to petitioner's apprehension the State agents had personally observed an unlawfully operating distillery, a felony under State law. Ga. Code Ann. 58-1076. They had probable cause to believe that the felony was being committed by the men whom they saw fleeing from the vicinity of the stills into a heavily wooded and sparsely populated area. With the agents in hot pursuit of the individuals, there was clearly no time to obtain a warrant. Needing assistance to apprehend the suspects, the agents called upon the prison trusties and bloodhounds. The role performed by the trusties was nothing more than a contemporary application of the time-honored, common-

law procedure whereby police officers summon private citizens to aid in the apprehension of fleeing suspected felons. Voorhees, *The Law of Arrest* 99-101 (2d ed. 1915); see *Robinson* v. *State*, 93 Ga. 77, 18 S.E. 1018; Ga. Code Ann. 27-206.

In any event, no incriminating information was secured from petitioner before agent Barrett assumed custody a few minutes after the initial apprehension. Barrett, who had seen the operating distillery prior to proceeding to the spot where petitioner was being detained, and was familiar with the circumstances surrounding petitioner's apprehension, certainly had probable cause to make an arrest. The contemporaneous search of the Chevrolet was reasonable, *Preston* v. *United States*, 376 U.S. 364, and the items obtained as a result of that search were properly admitted in evidence, *Warden* v. *Hayden*, 387 U.S. 294.

b. Following his arrest petitioner was twice advised of his right to counsel and silence. He was returned to the site of the distillery and stood by while the State and federal agents engaged in the task of investigating the area, inventorying the equipment, and destroying the stills. During this time he made two incriminating statements: one to a co-defendant admitting ownership of a jacket found at the still site, the other to agent Barrett indicating that he was the owner of the Chevrolet parked nearby. The comment made to a co-defendant does not fall within any constitutional or procedural proscriptions against evidence obtained by the government agents. The statement regarding ownership of the Chevrolet came during the course of the agents' investigation of the

stills, and was not made inadmissible because of the failure up to that time to take petitioner to a United States Commissioner. At that point, only a limited amount of time had elapsed, and there was accordingly no unreasonable delay. The nearest commissioner was 70 miles away and the stills required the immediate attention of the officers. (26 U.S.C. 5609a). Petitioner's statement was not the product of a period of delay used to question an unwarranted defendant as in *Mallory* v. *United States*, 354 U.S. 449, as the court below properly concluded (see Pet. App. 9-10). It was, therefore, properly admitted in evidence.

2. On the eve of trial petitioner moved to have the government disclose all of its witnesses. The district court, we submit, properly denied the motion. The government's witnesses consisted of State agents Hendley and Bailey, federal agent Barrett, and a chemist who identified substances taken from the seized Chevrolet as wheat bran and wheat starch. The identities of all these witnesses except the chemist were known to petitioner before trial since they had testified previously at the trial of Padgett and Cooper (Pet. 7). Petitioner has failed to establish prejudice from the mere failure to be made aware of the chemist's identity. Manifestly, he could reasonably have anticipated the crux of the chemist's expert testimony. *Archer* v. *United States*, 393 F. 2d 124 (C.A. 5); *United States* v. *Chase*, 372 F. 2d 453 (C.A. 4), certiorari denied, 387 U.S. 907; Rule 16, F.R. Crim. P.

3. At trial, agent Bailey testified that when he reached the site of the stills in pursuit of Padgett, he saw three men running away (R. 72). On cross-

examination defense counsel elicited the fact that at the trial of Padgett and Cooper two months before, Bailey stated that he had seen two men fleeing from the still site. Bailey acknowledged the prior testimony (R. 75-76). In his closing charge the trial judge did not refer specifically to this inconsistency, nor did he grant a request by defense counsel after the charge for further instructions on impeachment. However, the judge had given a lengthy charge on credibility, in which he instructed the jury that it was the sole judge of credibility and in that connection should consider, *inter alia*, the extent to which a witness was supported or contradicted by other evidence. The jurors had the inconsistent statement recalled to them by defense counsel in his closing argument and therefore were fully aware that Bailey's credibility was in issue and that his credibility was for them to decide. Accordingly, this issue was adequately handled, and provides no ground for reversal. *Thompson* v. *United States*, 389 F. 2d 37 (C.A. 9), certiorari denied, 391 U.S. 903.

4. Petitioner asserts several other claims relating to the trial court's charge. He complains that the court declined to instruct that, in order to convict on circumstantial evidence, every hypothesis except that of guilt must be removed by the evidence. Such a charge was rightly refused. The court instructed fully on the standard of reasonable doubt and the probative value of circumstantial evidence. In such a circumstance, the instruction requested by petitioner would have been "confusing and incorrect." *Holland* v. *United States*, 348 U.S. 121, 139-140. An instruc-

tion that no inference was to be drawn from "mere presence" at the site of a still was properly rejected as contrary to the evidence adduced by the government.

Finally, the attack upon the court's use of the word "confession" in the closing charge is frivolous. In discussing petitioner's statements admitting ownership of the jacket found at the distillery and the Chevrolet automobile located nearby, the court said, "I'm not telling you, if he did say it, that it was an admission or confession." The court instructed further that evidence regarding admissions and confessions should be viewed cautiously and weighed with care; but if the jury was satisfied that the statements were made, it should consider them as evidence against the person who made them (R. 135). There clearly was no error in these instructions.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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